Filed 2/10/04 P. v. Gomez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR REYNALDO GOMEZ,

Defendant and Appellant.

F041853

(Super. Ct. No. 671476-0)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. R. L. Putnam, Judge.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, J. Robert Jibson and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On July 3, 2002, an information was filed in Superior Court of Fresno County charging appellant Oscar Reynaldo Gomez with count I, felony driving under the influence (Veh. Code, § 23152, subd. (a)); count II, felony driving with a blood/alcohol level of .08 percent or higher (Veh. Code, § 23152, subd. (b)); count III, misdemeanor

battery (Pen. Code, § 243, subd. (e)(1)); and count IV, misdemeanor vandalism (Pen. Code, § 594, subd. (a)). As to counts I and II, it was alleged appellant suffered three prior convictions within the meaning of Vehicle Code section 23550.5, subdivision (a)(1); suffered one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12); and served two prior prison terms (Pen. Code, § 667.5, subd. (b)). Appellant pleaded not guilty and denied the special allegations.

On October 3, 2002, appellant admitted the prior conviction allegations and his jury trial began. On October 8, 2002, appellant was found guilty as charged.

On November 6, 2002, the court denied probation and sentenced appellant to eight years in prison: as to count I, the upper term of three years, doubled to six years as the appropriate second strike term, with two consecutive one-year terms for the prior prison term enhancements. The court stayed the sentence imposed for count II, and imposed local time served for counts III and IV.

On November 7, 2002, appellant filed a timely notice of appeal.

FACTS

At approximately 12:31 a.m. on May 14, 2002, Fresno Police Officer Robert Boccasile received a dispatch directing him to Teresa D.'s apartment on Sierra Madre in Fresno. Teresa had called the police and reported appellant Oscar Gomez "had previously kicked her in the stomach trying to make her miscarry."

Officer Boccasile arrived at her apartment at 12:37 a.m. and Teresa appeared calm. Teresa lived with appellant and was six weeks pregnant with his child. She reported an incident that occurred on the morning of May 13, when appellant woke up and denied the baby was his child. He accused her of being a prostitute and sleeping with other men. Appellant told her that "she needed to get rid of the baby," and "[i]f she didn't get rid of it, he was going to get rid of it for her." Teresa reached for the telephone and dialed 911 for the police because appellant was "increasingly more violent." Appellant realized she was calling the police and hung up the telephone. Teresa tried to

run out of the apartment but appellant grabbed her from behind, threw her down on the ground, and again told her that she needed to get rid of the baby. When she tried to get up, appellant kicked her twice in the buttocks with his foot. Teresa gathered her belongings and left the apartment.

Teresa informed Officer Boccasile that she delayed reporting the incident because she went to her doctor that day to make sure she was okay. After thinking about the situation, she decided to report the incident because she wanted to obtain an emergency protective order (EPO) against appellant.[1] Teresa stated appellant drank heavily but he hadn't been drinking at the time of the incident. Boccasile realized there was a discrepancy between her dispatch call that she was kicked in the stomach, and her statement that appellant kicked her in the buttocks. Boccasile specifically asked Teresa if appellant kicked her in the stomach. Teresa replied no and said he kicked her in the buttocks. Boccasile called for a female officer to respond to the scene to examine Teresa, but the officer didn't observe any visible injuries on Teresa. Boccasile also called a judge and obtained the EPO.

As Officer Boccasile was about to leave Teresa, they both heard the loud engine of a vehicle driving through the alley next to Teresa's first floor apartment. Teresa walked toward the alley but immediately returned to Officer Boccasile and said, "he had returned, that he was back, he was back." Teresa's demeanor completely changed and she appeared anxious and frightened.

Officer Boccasile walked toward the alley and heard glass breaking. Boccasile walked around the corner of the building within seconds of hearing the broken glass, and

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[1]An EPO is a five-day restraining order which a judge will grant on an emergency basis, for due cause and without cost, subject to the victim obtaining a permanent restraining order.

observed appellant standing behind Teresa's parked minivan. Boccasile testified there was a streetlight in the alley and the area was fairly well illuminated. The minivan's rear windshield was "all smashed out." Appellant turned away from the minivan and ran toward his white pickup truck, which was parked nearby, and threw something in the back. Boccasile yelled at appellant to stop and raise his hands. Appellant turned toward Boccasile but did not stop. Boccasile thought appellant had a beer in his hand. Appellant entered his pickup truck, shut the door, said "'fuck you,'" and "roared off down the alley" toward Maple Avenue. Boccasile returned to his patrol car and broadcast appellant's description and his route.

Officer Alfred Avila was on patrol at Shaw and Maple, just two to 300 yards from Teresa's apartment, when he heard the dispatch about appellant and his truck. Within 10 to 15 seconds, Avila observed appellant's truck traveling north on Maple. It was about 1:45 a.m. and there were no other vehicles in the area. The truck slowly went through the red light at Maple and Shaw, and turned east on Shaw Avenue. The driver then burned the tires and accelerated to 50 miles per hour in a 45-miles-per-hour zone, but the driver never lost control of the vehicle. Avila followed the truck as it slowly went through another red light at Shaw and Chestnut. The truck turned into a Jack-in-the-Box parking lot and continued into an adjoining vacant lot. Avila had activated the signal lights on his patrol car as he went through the intersections but turned off the lights as he followed the truck. When the truck turned into the parking lot, Avila again activated the signal lights and the truck stopped in the vacant lot.

Officer Avila testified appellant immediately emerged from the truck without being ordered to, and Avila thought appellant was going to run. Instead, appellant got down on the ground and started rolling around. Avila called for backup officers. Avila testified appellant was operating a vehicle unsafely since he had been burning his tires and running red lights.

Appellant was uncooperative and refused to respond to Officer Avila's requests for his name, address, and birth date. Avila found appellant's identification in his wallet and obtained the pertinent personal information. Avila testified appellant displayed objective symptoms of alcohol intoxication. Appellant had the strong odor of alcohol on his breath, his eyes were glassy and blood-shot, and his speech was slow. Avila testified appellant was "pretty intoxicated" and on a scale of one to10, appellant was "probably about a nine." Avila looked inside appellant's truck and found an ice-cold, 12-ounce bottle of beer which contained a small amount of alcohol. After arrival of backup officers appellant was arrested without incident.

Officer Avila testified that he usually directed suspects to perform various field sobriety tests when he detected signs of intoxication. Avila decided against having appellant perform the field tests, however, because he was uncooperative and Avila thought he still might run. "Being that he wasn't saying anything and leaving the scene of a domestic violence that just occurred, I felt that he would probably run if I go out there in the parking lot and start doing field tests." Avila also decided against having appellant perform the breath test, and transported appellant to University Medical Center for a blood draw to determine his blood/alcohol level.

> "Q Okay. Is that your normal procedure for DUI's?
>
> "A Yes, or the breath—the intoxilizing machine, which is at the jail.
>
> "Q Why did you choose blood?
>
> "A Because he was uncooperative. I didn't think he would complete the breath test."

Avila explained the breath test would have required appellant to blow into the hose for five to 10 seconds to get a reading, while a blood draw would be fairly simple.

Officer Avila transported appellant to the hospital. Appellant was "[b]elligerent, argumentative, just constantly talking" and "pretty mad" during the drive.

> "Q Now, when you were during that transport of [appellant], did he say anything while you were transporting him or doing anything in the back seat of the patrol vehicle?
>
> "A Real argumentative, belligerent. He didn't care any more and really didn't want to say anything."

Appellant's voice was slurred and his breath continued to smell of alcohol. Appellant did not sleep or pass out during the trip.

Officer Avila arrived at the hospital with appellant about one hour after he was arrested, and a technician drew two vials of blood. Appellant still had glassy, blood-shot eyes and the strong odor of alcohol on his breath. He didn't say anything while they were at the hospital.

Officer Avila handcuffed appellant and escorted him from the hospital to the patrol car to transport him to jail. Avila placed appellant in the back seat. Avila testified appellant "kept telling me he didn't care any more. Didn't want to say anything. Just a lot of profanity." Appellant began shaking the patrol car from the back seat, and rocked the vehicle back and forth "wanting officers to take him out of the car and shoot him." Avila had to call for a patrol wagon, and the officers placed him in the wagon and transported him to jail. When appellant was booked, "[h]e made statements that he didn't care. That it was all my fault for the arrest. And he was belligerent. Profanity." Appellant still exhibited the same signs of intoxication.

Additional Trial Testimony

Appellant's blood/alcohol level was subsequently determined to be .23 percent. A forensic toxicologist testified that the results indicated appellant was "very seriously impaired" and "extremely intoxicated." An internal retest was later conducted on appellant's blood sample, and the results were the same.

At trial, Teresa D. testified for the prosecution but was an extremely reluctant witness. Teresa denied that she called the police or made any kind of report to Officer Boccasile in May 2002. Teresa testified appellant did not kick or assault her in any way,

and that he was not a physically violent person. Teresa testified her apartment was in a high crime area with gang activity, the window of her minivan had been cracked in a previous incident, and she replaced the window for $150. Teresa denied appellant had drinking problems and asserted they were both active in their church and taught at a rehabilitation center. Teresa testified she married appellant in July 2002, and she was 26 weeks pregnant at the time of trial. She was waiting to go on maternity leave and needed someone to "feed my kid while I'm on maternity leave."

Officer Boccasile testified that he responded to a subsequent dispatch at Teresa's apartment after his initial visit in May 2002. Teresa's subsequent call was based on the report that someone threw ice cream in her window. Boccasile investigated the area but didn't find anyone. Boccasile asked Teresa about the prior incident involving appellant and the smashed window on her minivan. Teresa stated it cost $800 to replace the window but she was concerned that if appellant was punished for the incident, he would not be able to take care of her and the baby.

Appellant did not testify and did not present any witnesses. However, defense counsel extensively cross-examined Officer Avila as to the hospital's procedures to obtain appellant's blood sample, and the chain of evidence which led to the blood/alcohol test results. As will be discussed in section II, defense counsel also cross-examined Avila about his decision to have appellant submit to a blood test instead of a breath test to determine his blood/alcohol level, and whether Avila complied with the implied consent law. (Veh. Code, § 23612.)

Appellant was convicted of count I, felony driving under the influence; count II, felony driving with a blood/alcohol level of .08 percent or higher; count III, misdemeanor battery on Teresa; and count IV, misdemeanor vandalism by breaking the window on Teresa's vehicle. He was sentenced to the second strike term of eight years in prison. On appeal, he contends the trial court improperly gave CALJIC No. 2.71 on the consideration of admissions because his pretrial statements were not inculpatory.

Appellant also contends the court should have given his requested instruction as to Officer Avila's alleged violation of the implied consent law and failure to offer appellant the choice of a breath test instead of a blood test to determine his level of intoxication. Finally, appellant contends there is insufficient evidence to support his misdemeanor conviction for vandalism of Teresa's vehicle because no one saw him break the window.

DISCUSSION

I.

CALJIC NO. 2.71

Appellant contends the trial court erroneously instructed the jury with CALJIC No. 2.71, admissions, because his pretrial statements were not inculpatory and the instruction constituted an improper judicial comment that the jury should view his pretrial statements with distrust.

The jury herein was given CALJIC No. 2.71, which stated:

> "An admission is a statement made by [the] defendant which does not by itself acknowledge [his] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] guilt when considered with the rest of the evidence.
>
> "You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> "[Evidence of an oral admission of [the] defendant not made in court should be viewed with caution.]"

When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; *People v. Carpenter* (1997) 15 Cal.4th 312, 392; *People v. Beagle* (1972) 6 Cal.3d 441, 455-456, superseded by statute on other grounds as stated in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208.) "The rationale behind the cautionary instruction suggests it applies broadly. 'The purpose of the cautionary instruction is to assist the jury in

determining if the statement was in fact made.' (*People v. Beagle*, *supra*, 6 Cal.3d at p. 456.) This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*People v. Carpenter, supra*, at pp. 392-393.)

"… In light of the definition of 'admission,' if the jury determines a statement does not tend to prove guilt when considered with the other evidence, it is not an admission. The cautionary language instructs the jury to view evidence of an *admission* with caution. By its terms, the language applies only to statements which tend to prove guilt and not to statements which do not." (*People v. Vega* (1990) 220 Cal.App.3d 310, 317.)

> "We recognize it is not uncommon that a single statement may tend to prove guilt or innocence, depending upon the state of the remaining evidence and the issue for which it is being considered. Many times extrajudicial statements of defendants, especially when made in the context of questioning by authorities, have the purpose of asserting innocence. Although a statement *when made* may not be incriminating, when considered with the rest of the evidence at trial it may nevertheless be viewed as an admission. For example, a defendant's statement denying participation in a crime may create an inference of incredibility or consciousness of guilt when considered along with other evidence connecting the defendant with the crime. That same statement may be purely exculpatory when considered in the absence of that other evidence. [Citation.] Similarly, a statement by a defendant purportedly giving an innocent explanation of the circumstances may be so implausible that it is incredible, thereby tending to prove guilt. Yet the implausible explanation may still be relied upon as a defense." (*People v. Vega, supra*, 220 Cal.App.3d at pp. 317-318.)

"… We are convinced a jury is capable of discerning whether an extrajudicial statement is an admission, which they are instructed to view with caution, or whether the statement is not an admission, to which the cautionary language does not apply." (*People v. Vega, supra,* 220 Cal.App.3d. at p. 318.) "Juries understand that [CALJIC No. 2.71] by its terms applies only to statements tending to prove guilt, not to exculpatory ones. To the extent a statement is exculpatory it is not an admission to be viewed with caution.

[Citation.]" (*People v. Senior* (1992) 3 Cal.App.4th 765, 777; *People v. Slaughter, supra,* 27 Cal.4th at p. 1200.) The effect of the instruction is thus beneficial to the defendant, as courts have long recognized the dangers and abuses inherent in evidence of verbal admissions. (*People v. Frye* (1998) 18 Cal.4th 894, 959.)

Appellant asserts that CALJIC No. 2.71 should not have been given to the jury because his pretrial statements were not inculpatory. Appellant's argument is based on a prior conflict between appellate districts as to whether exculpatory, nonhearsay statements were admissions which triggered the trial court's sua sponte duty to give CALJIC No. 2.71. In *People v. La Salle* (1980) 103 Cal.App.3d 139 (disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498), defendant admitted to arresting officers that he drove the car reportedly used in a rape but also made other exculpatory statements tending to establish an alibi. The trial court gave a former but substantially similar version of CALJIC No. 2.71. On appeal, defendant argued that CALJIC No. 2.71 improperly allowed the jury to consider his exculpatory statements as admissions. *La Salle* held the instruction's definition of an admission was overbroad, and explained that a cautionary instruction need not be given unless defendant's statements are introduced to prove the truth of the matter asserted, i.e., based on the admissions exception to the hearsay rule. (*People v. La Salle, supra,* at pp. 150-151; see Evid. Code, § 1220.) *La Salle* concluded, however, that any error in the instruction did not prejudice the defendant. (*People v. La Salle, supra,* at pp. 152-153.)

People v. Mendoza (1987) 192 Cal.App.3d 667 disagreed with *La Salle* and approved the present definition of an admission in CALJIC No. 2.71. In *Mendoza,* as in *La Salle,* defendant made exculpatory statements to arresting officers tending to establish an alibi, but the prosecution's independent evidence discredited that alibi. The trial court instructed the jury with CALJIC No. 2.71 over defendant's objection that his statements were not admissions. (*People v. Mendoza, supra*, at p. 675.)

Mendoza rejected *La Salle's* holding that an admission must be against the defendant's interest when made:

> "… First, a statement does not have to be offered for its truth to be accepted as an admission. Second, we apparently have more faith in the jury than the court in *La Salle:* there is no magic in determining whether a particular statement tends (or does not tend) to prove one's guilt. The jury, as factfinder, is perfectly equipped to make such determinations based on the existing CALJIC instructions without further explanation by the court." (*People v. Mendoza, supra*, 192 Cal.App.3d at p. 676, fn. 3.)

Mendoza held defendant's statements were properly characterized as admissions:

> "… Although ... appellant's statements were not admissible as hearsay statements because they were not offered for the truth of the matters asserted, those statements were properly characterized as admissions since an admission simply is any extrajudicial statement—whether inculpatory or exculpatory—'which tends to prove his guilt when considered with the rest of the evidence.' [Citation.] Because appellant's statements were admissions the court did not err in giving CALJIC Nos. 2.71 and 2.72." (*People v. Mendoza, supra,* 192 Cal.App.3d at pp. 675-676, fn. omitted.)

People v. Brackett (1991) 229 Cal.App.3d 13 also rejected *La Salle* and largely adopted *Mendoza*'s reasoning. In *Brackett,* defendant made certain statements during an assault on the victim threatening the victim with bodily harm and tending to establish a sexual motive for the assault. As in *Mendoza* and *La Salle,* defendant contended the court erred in giving CALJIC No. 2.71 because his statements to the victim were not introduced to prove their truth and were therefore not admissions. (*People v. Brackett, supra,* at pp. 18-19.) *Brackett* did not comment on whether the defendant's statements were introduced to prove their truth but, assuming that they were not, held they were nonetheless properly characterized as admissions. (*Ibid*.)

The California Supreme Court has apparently resolved this conflict and agreed with *Mendoza's* broad definition of an admission as "'any extrajudicial statement—whether inculpatory or exculpatory—"which tends to prove [a defendant's] guilt when considered with the rest of the evidence."'" (*People v. Garceau* (1993) 6 Cal.4th 140,

179-180 [overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118], citing *People v. Mendoza, supra*, 192 Cal.App.3d at pp. 675-676.)

We agree with *Mendoza's* broad definition. We also note that *People v. Vega, supra*, 220 Cal.App.3d 310 dealt with a similar situation. Defendant argued that his statements were both inculpatory and exculpatory, and CALJIC No. 2.71 should not have been given because it prejudicially told the jury to view his exculpatory statements with caution. *Vega* rejected the argument and found that since the instruction defined an admission as a statement tending to prove guilt, "a jury is capable of discerning whether an extrajudicial statement is an admission, which they are instructed to view with caution, or whether the statement is not an admission, to which the cautionary language does not apply." (*Id.* at p. 318.) Similarly, in *People v. Von Villas* (1992) 11 Cal.App.4th 175, defendant argued the court improperly gave CALJIC No. 2.71 because certain pretrial statements were ambiguous, and the instruction misled the jury and created confusion because it strongly suggested that the statements were admissions as a matter of law. The court disagreed and held the instruction "clearly points out that it was within the exclusive province of the jury to determine whether any statements made by [defendant] were 'admissions'. The jury was not railroaded in any way. The trial court did not commit error when it instructed the jury by giving the modified CALJIC No. 2.71." (*Id.* at p. 239.)

In the instant case, the trial court herein had a sua sponte duty to give CALJIC No. 2.71 even though appellant's pretrial statements were not direct or express admissions of guilt. Appellant's statements were not exculaptory, ambiguous, or even neutral under the circumstances of this case. Officer Boccasile heard the sound of breaking glass, immediately went into the alley, and saw appellant walking away from the shattered window on Teresa's minivan. Boccasile ordered appellant to stop, but instead appellant used profanity and fled. When appellant was in Officer Avila's custody, he was uncooperative, angry, and belligerent. As he was arrested and taken to the hospital for

the blood test, he continued to utter profanity, repeatedly said that he didn't care anymore, and said he wanted the officer to shoot him. When appellant was booked, he continued to say that he didn't care and it was Avila's fault that he was arrested. Such statements were admissions and reflected his consciousness of guilt when considered with the rest of the evidence.

Even if the trial court erred in instructing the jury with CALJIC No. 2.71, any error was harmless. Where a trial court gives a legally correct but inapplicable instruction, the error is usually harmless, having little or no effect other than to add to the bulk of the charge. (*People v. Von Villas, supra,* 11 Cal.App.4th at p. 238.) Such error is subject to the harmless error analysis articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130; *People v. Robinson* (1999) 72 Cal.App.4th 421, 428-429.) CALJIC No. 2.71 told the jury that any out of court statement made by appellant should be *viewed with caution,* that the jury was the exclusive judge of whether appellant made the admission and, if so, whether it was true. The instruction thus served as a cautionary instruction in favor of appellant. Moreover, the evidence of appellant's guilt was significant. Officer Avila observed objective symptoms of his intoxication, and appellant's blood/alcohol level was .23 percent. As will be discussed in section III, Officer Boccasile observed appellant flee from the area of Teresa's car just after hearing the sound of broken glass. Teresa made a detailed report of the battery inflicted by appellant the previous day. The jury was properly instructed to consider her credibility, and the jury's verdicts are supported by the evidence. It is not reasonably probable that appellant would have received a more favorable verdict even if the trial court had not instructed the jury to view his statements with caution.

II.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S REQUESTED INSTRUCTION

Appellant next contends the court should have given a requested instruction as to Officer Avila's purported violation of the implied consent law (Veh. Code, § 23612), and his failure to offer appellant the choice of taking either a breath or blood test to determine his blood/alcohol level. Appellant asserts the court's refusal to give this instruction deprived him of a defense and requires reversal of his convictions.

A. Background

As set forth in the factual statement, *ante*, Officer Avila testified appellant was uncooperative, angry, and belligerent when he was taken into custody. Avila detected objective signs of intoxication, based on appellant's bloodshot and glassy eyes, and the smell of alcohol on his breath. Avila testified he decided against administering field sobriety tests because he thought appellant might try to escape. Avila acknowledged that an intoxication suspect usually has the choice of either a breath test or a blood test. He informed appellant of this choice but appellant did not respond. Avila decided that appellant would not complete the breath test based on his uncooperative conduct, and transported appellant to the hospital for a blood test.

Defense counsel extensively cross-examined Avila on his decision to take appellant to the hospital for a blood test.:

> "[DEFENSE COUNSEL] You recall how the driving law—driving under the influence provided for choice of three tests for alcohol?
>
> "A Yes.
>
> "Q There used to be a urine test?
>
> "A Yes.
>
> "Q But we don't do that any more?
>
> "A Right.

"Q And now, the choice of tests includes a breath test or a blood test; is that right?

"A Right.

"Q And the Vehicle Code requires that you give somebody suspected of drunk driving, driving under the influence a choice; is that right?

"A Right.

"Q And you didn't give [appellant] a choice that evening; did you?

"A *I read to him that he had the choice at the scene. I didn't read it from the report, but I gave him the choice, and he didn't say anythi*ng.

"Q So you—you chose—you chose a blood test?

"A I chose it, yes." (Italics added.)

Avila testified that based on appellant's demeanor and conduct, he didn't believe appellant would cooperate and blow into the intoxilyzer machine.

During the instructional conference, appellant requested an instruction stating that he had the choice of a breath or blood test and Avila failed to offer him that choice. The prosecutor objected and argued it was too late for appellant to object to the admissibility of the blood test. The prosecutor noted appellant was bound by the implied consent law (Veh. Code, § 23612) to submit to a breath or blood test, incidental to a lawful arrest, if there is reasonable cause to suspect he was driving under the influence. The prosecutor noted Avila's testimony on this issue, and argued any failure to offer the choice was not a violation of appellant's constitutional rights and did not compel the exclusion of the blood/alcohol results. The prosecutor further argued that Avila's failure to comply with Vehicle Code section 23612 was not a defense to the charged offenses and was not a factual question for the jury.

Defense counsel conceded he was not going to ask the jury to disregard the results of the blood test, but argued it was still a factual question as to whether Officer Avila violated statutory procedures and failed to offer appellant the choice.

> "… And I think the jury should be properly instructed as to what the law is. Not to gauge the legal admissibility of anything, but to measure the weight of the evidence of his tests. I think the evidence that Avila testified to was that he did not think [appellant] would comply to a breath test. I don't think Avila said [appellant] did not have the capacity to do a breath test. It's not a capacity issue. Avila testified he didn't think he would comply, so he didn't give him a choice, and he just took him down to the hospital for a blood test without asking."

Defense counsel also conceded that a suppression-type motion could not be presented to the jury, but argued Avila's failure to offer appellant the choice of tests went to the weight of the evidence. The court found such an instruction was not appropriate or relevant to the issues in the case, and rejected appellant's instructional request.

B. Analysis

Appellant argues the court should have given his requested instruction on the implied consent law because Avila's failure to offer him the choice of a breath or blood test violated Vehicle Code section 23612, and "[t]he question of whether there was a need for a blood test should have been a question for the trier of fact. Phrased differently, the jury should have been able to determine whether Avila had a 'sufficient need' to make appellant submit to a blood test instead of a breath test."

Appellant's instructional issue requires a brief review of the implied consent law, which the Legislature enacted as one of the measures designed to attack the problem of drunk driving. (*Smith v. Department of Motor Vehicles* (1986) 179 Cal.App.3d 368, 373-374.) The implied consent law has been upheld against claims that the statute (1) violates the driver's privilege against self-incrimination, (2) authorizes an unreasonable search or seizure, (3) denies equal protection to variously defined classes, and (4) fails to satisfy procedural due process requirements. (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 73; *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 364-365.) Mere noncompliance with the implied consent law without more does not implicate any constitutional issue or invoke any statutory exclusionary rule. (*People v. Fiscalini* (1991) 228 Cal.App.3d 1639, 1645, fn. 7.)

The implied consent law, as stated in Vehicle Code section 23612, provides that any person who drives a motor vehicle is deemed to have given consent to chemical testing of his blood or breath for the purpose of determining his blood-alcohol content, if lawfully arrested for a violation of Vehicle Code section 23152. (Veh. Code, § 23612, subd. (a)(1)(A).) The driver has the choice of a blood or breath test, and "the officer shall advise the person that he or she has that choice." (Veh. Code, § 23612, subd. (a)(2)(A).) The Legislature, however, has restricted an arrestee's choice under certain circumstances. (*Smith v. Department of Motor Vehicles, supra*, 179 Cal.App.3d at p. 374.) "If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test." (Veh. Code, § 23612, subd. (a)(2)(A).) The statute confers the duties and responsibilities of administering the appropriate chemical test upon the arresting officers, who has broad discretion to comply with Vehicle Code section 23612, subdivision (a), and determine whether an arrestee is "incapable of performing the chosen test or that it [is] not feasible for the arrestee to perform a particular test." (*Smith v. Department of Motor Vehicles, supra*, at p. 375.) An officer's failure to offer an arrestee the choice of tests, or comply with the arrestee's choice, is not grounds for dismissal of criminal charges. (*People v. Superior Court (Maria)* (1992) 11 Cal.App.4th 134, 143-144.)

Under the circumstances of this case, Officer Avila did not violate the implied consent law and properly relied on the objective circumstances of appellant's conduct to determine he would not cooperate with the breath test. When appellant stopped his truck in the vacant lot, he emerged from the cab and Officer Avila believed he was going to run away. Instead, appellant mysteriously rolled around on the ground until he was taken into custody. Appellant refused to give his name, address, or birth date, and repeatedly uttered profanities. Avila properly decided against administering the field sobriety tests because the circumstances supported his belief that appellant might run away. Such

circumstances supported his decision that appellant would similarly not cooperate with the breath test, and the blood test would be more appropriate.

Aside from these legal issues, however, the trial court properly refused appellant's request for an instruction on Vehicle Code section 23612. "The trial court has a duty to instruct the jury on all principles of law relevant to the issues raised by the evidence (*People v. Saddler* (1979) 24 Cal.3d 671, 681) and a correlative duty to refrain from instructing on irrelevant and confusing principles of law (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10)." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250.) "'It has long been the law that it is error to charge the jury on abstract principles of law not pertinent to the issues in the case. [Citation.] The reason for the rule is obvious. Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved.' (*People* v. *Jackson* (1954) 42 Cal.2d 540, 546-547.)" (*People v. Robinson, supra,* 72 Cal.App.4th at p. 428.)

The entire basis for appellant's requested instruction was his contention that Officer Avila never offered him the choice of a breath or blood test. Appellant's request for such an instruction was not based on issues of Avila's credibility, but simply to advise the jury of Avila's purported violation of Vehicle Code section 23612. As set forth above, however, Avila testified without contradiction that he advised appellant of the choice of either a breath or blood test but appellant did not respond. Based on appellant's lack of cooperation and belligerent conduct, Avila properly determined that appellant was incapable of performing the breath test. In addition, appellant's requested instruction was irrelevant to any disputed factual or defensive questions in this case. Appellant did not move to exclude the results of the blood test, and did not claim that Avila's purported failure to offer the choice of tests somehow undermined the reliability of the blood test. Appellant's requested instruction was irrelevant to any of the disputed issues and would have been highly confusing to the jury. The court's refusal to give such an instruction did not impair appellant's ability to present a defense.

III.

SUBSTANTIAL EVIDENCE OF VANDALISM

Appellant was convicted of misdemeanor vandalism (Pen. Code, § 594, subd. (a)) based on the destruction of the window on Teresa's minivan. Appellant asserts his conviction is not supported by substantial evidence because Officer Boccasile didn't see him actually break the window, the circumstantial evidence was equally consistent with someone else breaking the window, and Teresa's testimony on this issue was equivocal.

In assessing the sufficiency of the evidence to sustain a criminal conviction, the reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Earp* (1999) 20 Cal.4th. 826, 887.) The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on "'isolated bits of evidence.'" (*People v. Johnson, supra,* at p. 577; *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Ibid.*) Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt. (*Ibid.*; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) It must not reweigh the evidence, reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 884.) Furthermore, an appellate court may reject the testimony of a witness who was apparently believed by the trier of fact only if that testimony is inherently improbable or impossible of belief. (*People v. Jackson* (1992) 10 Cal.App.4th 13, 21; *People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) An appellate court may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Penal Code section 594, subdivision (a) provides, in pertinent part, that every person who maliciously damages or destroys any real or personal property, not his or her own, is guilty of vandalism. Appellant does not assert that the destruction of a vehicle's window is not an act of vandalism, but instead contends there is insufficient evidence to support the jury's verdict. There is overwhelming evidence, however, to support appellant's conviction for vandalism. Officer Boccasile took Teresa's report about appellant's violent conduct toward her. As he was leaving, he heard the sound of a loud engine proceed through the nearby alley. Teresa peered outside and nervously announced that "he" had returned and was back. Boccasile immediately went outside and heard the sound of glass breaking. Boccasile testified there was sufficient light in the alley, and he observed appellant standing behind Teresa's minivan. The vehicle's rear window was shattered, and appellant was turning from the minivan and heading toward his pickup truck. Boccasile ordered appellant to stop and raise his hands. Appellant uttered a profanity, threw something in the back of his truck, and fled the scene. Such evidence supported the conclusion that appellant had returned to the apartment after his

early confrontation with Teresa, used some type of object to smash the window on her vehicle, threw the object into his truck, and made his escape.

While Teresa subsequently denied making any accusations against appellant, and claimed the vehicle's window had been previously damaged by gang-related violence in her neighborhood, such conflicts in the evidence presented disputed factual questions for the jury to resolve. We may not reweigh the evidence, and the inferences available from the direct and circumstantial evidence strongly support appellant's conviction for vandalism.

DISPOSITION

The judgment is affirmed.

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HARRIS, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

_____
LEVY, J.